BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2009-41-T

IN RE:	)	
	)	**BRIEF OF THE SOUTH**
Application of South Carolina Tariff Bureau, Incorporated for a Rate Increase	)	**CAROLINA OFFICE OF**
	)	**REGULATORY STAFF**
	)	
	)	

STATEMENT OF THE CASE

The South Carolina Tariff Bureau ("SCTB") filed an application with the South Carolina Public Service Commission ("Commission") dated January 15, 2009 requesting an increase in the rates charged by its members for regulated household goods moves in the State of South Carolina.

By Commission Directive issued February 25, 2009, the Commission granted the South Carolina Office of Regulatory Staff's ("ORS") request for sufficient time to conduct an impact study and set a due date of April 24, 2009 for ORS's report. In its initial report to the Commission, dated March 18, 2009, ORS notified both the Commission and the SCTB that, due to the failure of the SCTB's members to respond to ORS's data request, ORS was unable to perform sufficient substantive testing and analysis to formulate an opinion as to the impact of the SCTB's proposed tariff changes. As further stated in that report, of the six members selected to provide data to ORS, three responded by providing incomplete records and two failed to provide any information whatsoever. ORS reported to the Commission that it could not calculate the impact of the proposed rates in the SCTB's application unless it was provided with sufficient financial information and business records to determine the impact on the SCTB's coverage ratio.

By Order dated May 28, 2009, the Commission requested the Parties in this matter provide briefs addressing ORS's scope of authority to request information from members of the SCTB to perform an audit and impact study of a proposed increase in rates.

EVIDENCE OF THE CASE

ORS's position in the matter is stated in its March 18 and April 10, 2009 letters to the Commission which are a part of the record in this matter. The following legal arguments are further supported by the authority granted the ORS under 2004 Act. No. 175 as codified under Title 58 of the South Carolina Code, the Public Service Commission Motor Carriers Regulations contained in S.C. Code Regs. 103-100, *et seq.* and the terms and conditions of the Certificates of Public Convenience and Necessity issued by the Commission to the members of the SCTB.

SUPPORTING AUTHORITY

ORS is charged with the duty to, among other things "when considered necessary by the Executive Director of the Office of Regulatory Staff and in the public interest, review, investigate, and make appropriate recommendations to the commission with respect to the rates charged or proposed to be charged by any public utility." S.C. Code Ann. §58-4-50(A)(1) (Supp. 2008). ORS is further authorized to "make inspections, audits, and examinations of public utilities regarding matters within the jurisdiction of the commission" and "shall also make such inspections, audits, or examinations of public utilities as requested by the commission." S.C. Code Ann. §58-4-50(A)(2) (Supp. 2008). As this matter involves an issue of ratemaking, it is a "contested case" as defined by the South Carolina Administrative Procedures Act under S.C. Code Ann. §1-23-310(3) (Supp. 2008).

The specific authority for ORS to request the information and documentation necessary to perform the impact study at issue in this matter is provided in S.C. Code Ann. Section 58-4-55(A) (Supp. 2008), which provides in relevant part that, "The regulatory staff, in accomplishing its responsibilities under Section 58-4-50, may require the production of books, records, and other information that, upon request of the regulatory staff, must be submitted under oath."

The criteria to be used by the Commission in the establishment of rates for motor carriers are set forth in 26 S.C. Code Ann. Regs. 103-194 (Supp. 2008). That standard includes "the need in the public interest of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service and to the need of such carriers for revenues sufficient to enable them, under economical and efficient management, to provide such service." S.C. Code Ann. Reg. 103-194. The determination of a fair operating ratio is peculiarly within the province of the Public Service Commission and cannot be set aside in the absence of a showing that it is unsupported by substantial evidence in the record. Hamm v. S. C. Public Serv. Comm'n, 289 S.C. 22, 344 S.E.2d 600 (1986). Substantial evidence is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Porter v. S. C. Public Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998).

ARGUMENT

A. The Information Requested by ORS Is Necessary to Prepare a Thorough Impact Study For the Commission.

The impact study with which the SCTB members refused to cooperate is necessary to allow ORS to make a report and recommendation to the Commission. The key element of this study entails an examination of both the financial and business records of a sample portion of the nearly sixty members of the SCTB. ORS selected a representative sampling of six members for this study and mailed these

household goods carriers a detailed data request asking for certain financial and accounting records. The companies were given thirty days to provide the requested information to ORS. As stated in the ORS letter to the Commission of March 18, 2009, one of the six companies fully complied with the ORS data request, three responded by providing ORS with partial records, and two companies failed to provide any data or information to ORS Auditors.

As stated in ORS's letter to the Commission dated April 10, 2009, in determining the impact of an applicant's proposed tariff change on its coverage ratio, the percentage of its regulated revenues to its total revenues is utilized by ORS Auditors to allocate shared expenditures between the regulated and the non-regulated activities of the company. Therefore, in the examination of an applicant who performs both state regulated and non-regulated services, as is the case with most, if not all, of the SCTB members, it is essential that **all** of the company's transactions, and the supporting documentation for those transactions, be subject to examination. Only through an examination of all of a company's revenue transactions (bills of lading) can ORS Auditors determine whether the revenues being reported are complete, accurate, and properly classified as either regulated or non-regulated. In the same manner, ORS must perform an examination of all expenditures (invoices) of an applicant company to ensure that all expenditures for the conduct of regulated activities are included in the regulated net income and that expenditures for non-business purposes are excluded from net income. This also ensures that the allocations are proper and that the shared expenses, once allocated, do not exceed 100%. By refusing to provide ORS with the data and records necessary to verify revenues and expenditures, the members made it impossible for ORS to determine the impact of the SCTB's proposed tariff change on its coverage ratio.

ORS repeatedly attempted to explain the impact study process to the executive board and officers of the SCTB. Despite numerous telephone conferences and visits by the ORS Audit Department Staff to the offices of the members of the SCTB selected as a sampling of the membership, the majority of the selected companies failed to provide sufficient financial documentation and data to

allow ORS to perform an impact study. The SCTB members' failure to provide sufficient data and information made it necessary for ORS to recommend denial of the application. ORS cannot make a recommendation to the Commission unless the members of the SCTB, either voluntarily or by Order of the Commission, provide sufficient data and records to ORS. ORS has the authority to require the SCTB members to provide the requested records. In the case here, ORS not only considered it necessary to request transaction and expenditure documentation from SCTB members under the duties which it is charged to perform under §58-4-50(A)(1), but did so as a direct result of the request of the Commission. In Order No. 2009-133 the Commission directed ORS to "complete its investigation and make a recommendation to the Commission concerning disposition of this matter on or before April 24, 2009."

As indicated by the request for a report by the Commission in Order No. 2009-133, ORS's explanation of the need for the requested financial and business documentation herein, and ORS's letter dated April 10, 2009, the Commission will not have any information regarding "lowest cost" or verified revenues of the SCTB or its members unless ORS is provided with the transaction and expenditure documentation which it requested. The Commission should not be forced to make a decision regarding the SCTB's request for a tariff increase without the impact study. Without the requested impact study, there is no evidence in this docket to support the SCTB's requested increase. The materials requested by ORS from the SCTB to conduct the impact study in this case are the same as those requested of all carriers seeking a change in rates and charges. This procedure was first established by ORS and approved by the Commission in Docket No. 2005-38-T. In accordance with S.C. Code Ann. §58-23-1010 the Commission has the authority to fix and approve the rates, fares, and charges for household goods movers. As stated in Hamm v. S. C. Public Serv. Comm., 344 S.E.2d 600 (SC 1986), an applicant must provide substantial evidence to justify a change in its rates and charges. There is no such evidence in the record of this case due to the lack of an impact study resulting from the SCTB's failure to cooperate with ORS.

B. Federal Anti-Trust Concerns

In addition to the authority provided to the Commission and ORS to require the SCTB to produce the records and documentation requested by ORS Auditors, the SCTB and its members must provide the requested financial information to establish that the SCTB rates are established as a result of "active supervision" by the Commission and the State of South Carolina. In May 2007 the Surface Transportation Board ("STB") issued Ex Parte 656 (Decision 28572, Docket No. EP-656) revoking the anti-trust immunity for motor carriers to engage in collective rate making. In this decision the STB effectively terminated its approval of all motor carrier bureau agreements under 49 U.S.C. 13703(c). As affirmed by subsequent Orders of the STB issued on June 28, 2007 and October 24, 2007, the previously existing immunity from federal anti-trust laws for rate bureaus was removed effective January 1, 2008. *See*, Attachments A and B. While the STB declined to interpret how the federal anti-trust laws could be enforced against rate bureaus post January 1, 2008, the United States Department of Justice and the Federal Courts have provided some guidance.

In 2003, the Federal Trade Commission ("FTC") issued complaints against the Alabama Trucking Association (FTC Docket No. 9307), the Kentucky Household Goods Carrier's Association (FTC Docket No. 9309), and the Movers Conference of Mississippi (FTC Docket No. 9308) for filing tariffs containing collective rates on behalf of their members for intrastate moving services in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. *See*, Attachments C, D, and E. In all three cases the organizations entered into Consent Agreements with the FTC in which they agreed to cease and desist their tariff and collective rate-making activities. In bringing these actions for alleged violations of federal anti-trust laws, the FTC relied on the "active supervision" inquiry established by the U.S. Supreme Court in FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992). *See*, Attachment F. The Court stated that the "active supervision" inquiry "is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.

As with the causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." FTC v. Ticor, 504 U.S. 621 at 634-35.

In Ticor, the U.S. Supreme Court created an exemption from federal anti-trust challenges where there is evidence of a "state-supervised, market sharing scheme" and established the doctrine "that federal antitrust laws are subject to supersession by state regulatory programs." Ticor, 504 U.S. 621 at 632 (citing Parker v. Brown, 317 U.S. 341 at 350-352 (1943)). This precondition for immunity from federal antitrust law for private parties such as the SCTB requires passing a two-part test. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." Ticor, 504 U.S. 621 at 633 (quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 at 105 (1980)).

The first part of this test appears to have been met as shown in South Carolina's clearly articulated policy set forth in S.C. Code Ann. §58-23-1010(A) (Supp. 2008) which provides in relevant part that, "The commission may approve joint rates, local rates, and rate agreements between two or more motor carriers relating to rates, classifications, allowances, and charges agreed to and published by individuals, firms, corporations, or the South Carolina Tariff Bureau. Any of these agreements when approved by the commission are not in violation of Section 39-3-10." This then leaves the question of whether the State of South Carolina, through the Commission, is actively supervising the rates set forth in the SCTB's tariff. In numerous cases cited by the Court in Ticor, where a state commission allowed collective rate increases to go into effect without a comprehensive investigation, supporting justification or supporting materials being provided to or checked for accuracy by the state regulatory body, the collective rates were found to violate federal anti-trust law. Ticor, 504 U.S. 621 at 630.

ORS takes no position and specifically declines to state a legal opinion regarding whether the collective rate tariff of the SCTB violates federal anti-trust laws. However, the filing of such a

collective rate tariff absent active supervision by the Commission and ORS would appear to open the door to possible allegations that the SCTB's collective tariffs are not entitled to immunity and violate federal anti-trust law.

CONCLUSION

It is in the best interest of the public, as well as the SCTB itself, to allow a full examination of a sampling of the SCTB members. Absent such a review, ORS is unable to provide the Commission with an accurate report or recommendation, the Commission is forced to abdicate its effective oversight of rates, and the SCTB potentially forfeits it exemption from federal antitrust laws due to the lack of "active supervision" by a state regulatory agency. The Commission clearly does possess the authority, in accord with the SCTB's request, to order the ORS to limit its requests for information. Given that scenario, however, ORS will only be able to, once again, report to the Commission that it has insufficient documentation to calculate a coverage ratio and recommend the Commission deny the SCTB's application. At this time ORS would need a minimum of 90 days after the requested materials and documentation are provided to it in order to perform a thorough review and prepare an impact study for the Commission.

Jeffrey M. Nelson, Esquire
OFFICE OF REGULATORY STAFF
1401 Main Street, Suite 900
Columbia, South Carolina 29201
Phone: (803) 737-0823
Fax: (803) 737-0895
jnelson@regstaff.sc.gov

June 26, 2009
Columbia, South Carolina

ATTACHMENT A

SURFACE TRANSPORTATION BOARD DECISION DOCUMENT

Decision Information

Docket Number: **EP_656_0**

Case Title: **MOTOR CARRIER BUREAUS--PERIODIC REVIEW PROCEEDING**

Decision Type: **Decision**

Deciding Body: **Entire Board**

Decision Summary

Decision Notes: **DECISION GRANTED AN EXTENSION FROM SEPTEMBER 4, 2007, UNTIL JANUARY 1, 2008, OF THE EFFECTIVE DATE OF THE BOARD'S DECISION TERMINATING ITS APPROVAL OF ALL 12 OF THE MOTOR CARRIER BUREAU AGREEMENTS THAT ARE STILL IN EFFECT.**

Decision Attachments

38038.pdf 75 KB

Approximate download time at 28.8 kb: **56** Seconds

Note:
If you do not have Acrobat Reader, or if you have problems reading our files with your current version of Acrobat Reader, the latest version of Acrobat Reader is available free at www.adobe.com.

Full Text of Decision

38038
EB

SERVICE DATE – JUNE 28, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 656

MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

STB Ex Parte No. 656 (Sub-No. 1)

INVESTIGATION INTO THE PRACTICES
OF THE
NATIONAL CLASSIFICATION COMMITTEE

[1]

Section 5a Application No. 46 (Sub-No. 20)

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

Decided: June 27, 2007

The Board is extending the effective date of its decision terminating its approval of motor carrier bureau agreements under 49 U.S.C. 13703(c), from September 4, 2007, until January 1, 2008.

BACKGROUND

[2]

By decision served on May 7, 2007, the Board terminated its approval of all outstanding motor carrier bureau agreements under 49 U.S.C. 13703(c) – the agreements of 11 motor carrier rate bureaus and the agreement of the National Classification Committee (NCC). The Board concluded under section 13703(c)(1) that termination of these agreements was necessary to protect the public interest, particularly the public's interest in reasonable rates for shippers. The agency also found that antitrust immunity may be terminated without significant adverse effect on motor carrier efficiency or profitability or other policies favored under the motor carrier transportation policy set forth in 49 U.S.C. 13101(a). The agency stated that it would now be incumbent upon the bureaus to determine the extent to which their present activities comply with the antitrust laws or would need to be reformed. To the extent the bureaus are uncertain about their exposure to antitrust liability, the Board encouraged them to consult advisors regarding the bounds of permissible activity and to take advantage of the business review procedure administered by the Antitrust Division of the United States Department of Justice (DOJ). To provide time for the industry to adjust to a new environment without antitrust immunity for motor carrier bureau activities, the Board provided that its decision would not become effective until September 4, 2007.

Various parties have filed petitions requesting that the Board extend the effective date of this decision to dates between September 4, 2008, and November 4, 2008.[3] The parties requesting extensions argue that no interests would be harmed and that the process of adjusting to termination of antitrust immunity is very complex, warranting additional time to comply. They contend that they need more time to consult with their carrier members and legal advisors and to pursue business review letters from DOJ. Furthermore, the HGCBC and some of its members, along with the NBTA, have pointed out that the current 4-month implementation period, which they contend would involve substantial changes to the way they do business, runs during their peak business season.

NASSTRAC, Inc. (NASSTRAC) (formerly the National Small Shipments Traffic Conference, Inc.) filed in opposition to virtually all of the extension requests other than those sought on behalf of household goods carriers and bus carriers. The National Industrial Transportation League (NITL) and the National Electrical Manufacturers Association filed in opposition to the extension request of NCC. They argue that no postponement of the already lengthy effective date is warranted and raise concerns about whether the bureaus will engage in harmful activities during an extended implementation period. The Board has also received a joint letter filed by eight Members of Congress in support of NCC's extension request.[4]

DISCUSSION AND CONCLUSIONS

The bureaus and their supporters (hereafter, "the bureaus") have not justified the extraordinarily long extensions that they seek. Such long delays are not necessary for a smooth transition to a motor carrier industry without antitrust immunity. However, the Board is sympathetic to arguments that it may be difficult to commit all of the necessary managerial resources to implementing a revised business model during a peak period in the normal business cycle. While not all bureaus will experience such a peak, in the interest of ensuring an orderly transition across the entire motor carrier industry, the Board will extend the effective date by approximately another 4 months, until January 1, 2008.

We reject arguments that a much longer delay in the effective date is warranted. Some bureaus argue that their very first opportunity to present a revised business model to carrier members will be at regularly scheduled meetings set to take place after the initial effective date. This business-as-usual approach toward what the bureaus describe as a major industry development is surprising and cannot justify further delay. Most bureaus did not provide specifics regarding their planned transition efforts or valid reasons why the process cannot begin earlier. And citing to the length of time the Board took to consider and reach its decision simply has no relevance to how long it will take the bureaus and member carriers to adjust their business models to comply with the antitrust laws.

Although we support bureau efforts to seek business review letters from DOJ, it is not appropriate to tie the effective date of the Board's decision to the completion of that process. No bureau is under any obligation to seek a business review letter and many (or all) may choose not to do so. The DOJ business review process is but one avenue by which the bureaus can inform themselves about the boundaries of permissible behavior. The bureaus must, as all other trade associations subject to the antitrust laws do, familiarize themselves with the law regarding communications and collaborations between competitors, review existing publications by the antitrust enforcement agencies, and, as necessary, consult legal advisors with expertise in this area. Not all of the activities of the bureaus will require detailed analysis as to whether they can continue in their present form. For those activities that do require more detailed scrutiny, it is incumbent upon the bureaus themselves to undertake the work of reform and make informed decisions about modifications to their business practices.

We also believe that the new effective date, which provides an 8-month implementation period, is more than sufficient to review and, if necessary, revise the classification system. While it is true that, when the Board's decision becomes effective, the NCC will be under some risk of antitrust liability, the risk of its behavior being found violative of the antitrust laws is really no different than that of any other association performing a similar function. As the Antitrust Modernization Committee recently recommended to Congress and the President, a need for certainty as to antitrust exposure is not an appropriate justification for continued immunity from the antitrust laws. See Antitrust Modernization Commission, Report and Recommendations, April 2007 at 350-51 (cautioning that "no immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk" as such risks are among costs of doing business that all American companies must manage). Even if it takes slightly longer than the effective date to complete any reforms to classification, we do not see why individual motor carriers cannot efficiently price their services as a new system is being devised, relying upon their own cost models, individual consultation with NCC staff, or other means.

We are sensitive to the shipper organizations' concern regarding whether bureaus will engage in intentionally anticompetitive behavior during a longer implementation period. Of course, that is no different than the risk that existed during the initial 120-day period. In any event, we believe that it would hardly be in the bureaus' self-interest to engage in such behavior just as they begin to work with an antitrust enforcement agency to reform their processes. In the meantime, collective actions taken by the bureaus remain subject to challenge before the Board.

When Congress mandated periodic Board review of existing motor carrier bureau agreements under a public interest standard, the bureaus were effectively put on notice that continued Board approval of bureau agreements was not guaranteed. And the Board's decisions in 1998 and 2003, questioning the proffered justifications for continued approval and conditioning approval upon increasingly stringent conditions, suggested a growing skepticism of the public benefits of the current rate bureau system. Under these circumstances, the bureaus should have at least considered the possibility that Board approval would terminate one day and considered appropriate contingency plans. To the extent the bureaus failed to do so, their inaction should not serve as a basis for further delay, and shippers should not be denied the full benefits of free market competition beyond an appropriate implementation period.

We will give all bureaus until January 1, 2008, to prepare for the loss of antitrust immunity and to ensure an orderly transition. This additional approximate 4 months will provide more time for the bureaus to evaluate and revise their practices to comply with the antitrust laws, and will remove the risk of any significant business cycle hardship resulting from the service date of our recent decision. However, we caution the bureaus that they should not expect further delay and that they should proceed expeditiously toward reform.

It is ordered:

1. The effective date of the decision served May 7, 2007, in this proceeding is extended until January 1, 2008.

2. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

---

[1] This decision also embraces EC-MAC Motor Carriers Service Association, Inc., STB Section 5a Application No. 118 (Sub-No. 2); Household Goods Carriers Bureau Committee – Agreement, STB Section 5a Application No. 1 (Sub-No. 10); Machinery Haulers Association, Inc. – Agreement, STB Section 5a Application No. 58 (Sub-No. 4); Middlewest Motor Freight Bureau, Inc. – Renewal of Agreement, STB Section 5a Application No. 34 (Sub-Nos. 8 and 10); Nationwide Bulk Trucking Association, Inc. – Agreement, STB Section 5a Application No. 63 (Sub-No. 4); Application of the National Bus Traffic Association, Inc., for Extended Approval of its Conformed Agreement; STB Section 5a Application No. 9 (Amendment No. 8); National Classification Committee – Agreement, STB Section 5a Application No. 61 (Sub-No. 6); Pacific Inland Tariff Bureau, Inc. – Renewal of Agreement, STB Section 5a Application No. 22 (Sub-Nos. 7 and 8); Rocky Mountain Tariff Bureau, Inc., STB Section 5a Application No. 60 (Sub-Nos. 10 and 11); Southern Motor Carriers Rate Conference, Inc., STB Section 5a Application No. 46 (Sub-No. 21); New England Motor Rate Bureau, Inc., STB Section 5a Application No. 25 Amendment No. 8); North American Transportation Council, Inc., STB Section 5a Application No. 45 (Amendment No. 17); and Western Motor Tariff Bureau, Inc. – Agreement, STB Section 5a Application No. 70 (Sub-No. 12).

[2]

Motor Carrier Bureaus – Periodic Review Proceeding, STB Ex Parte No. 656, et al. (STB served May 7, 2007) (Periodic Review Proceeding), corrected (STB served May 16, 2007).

[3]

The parties requesting the extensions are: Allied Van Lines, Inc., jointly with North American Van Lines, Inc., and Global Van Lines, Inc.; Household Goods Carriers Bureau Committee (HGCBC); Middlewest Motor Freight Bureau, Inc., jointly with Pacific Inland Tariff Bureau, Inc.; National Bus Traffic Association, Inc. (NBTA); National Motor Freight Traffic Association and its motor carrier bureau subsidiary, the NCC (NCC); North American Transportation Council, Inc.; Rocky Mountain Tariff Bureau, Inc.; Southern Motor Carriers Rate Conference, Inc.; and Machinery Haulers Association, jointly with Nationwide Bulk Trucking Association.

[4]

The letter was submitted by Congressmen Nick J. Rahall II, John L. Mica, Bart Gordon, John J. Duncan, Jr., Thomas M. Reynolds, Jim Cooper, Brian Higgins, and Michael T. McCaul.

ATTACHMENT B

SURFACE TRANSPORTATION BOARD DECISION DOCUMENT

Decision Information

Docket Number: **EP_656_0**

Case Title: **MOTOR CARRIER BUREAUS--PERIODIC REVIEW PROCEEDING**

Decision Type: **Decision**

Deciding Body: **Entire Board**

Decision Summary

Decision Notes: **DECISION DENIED THE PETITION OF THE HOUSEHOLD GOODS CARRIERS' BUREAU COMMITTEE FOR CLARIFICATION OF THE BOARD'S DECISION TERMINATING ITS APPROVAL OF MOTOR CARRIER BUREAU AGREEMENTS UNDER 49 U.S.C. 13703(C).**

Decision Attachments

38220.pdf 15 KB

Approximate download time at 28.8 kb: **24** Seconds

Note:
If you do not have Acrobat Reader, or if you have problems reading our files with your current version of Acrobat Reader, the latest version of Acrobat Reader is available free at www.adobe.com.

Full Text of Decision

38220
EB

SERVICE DATE – OCTOBER 25, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 656

MOTOR CARRIER BUREAUS – PERIODIC REVIEW PROCEEDING

Decided: October 24, 2007

The Board is denying the petition of the Household Goods Carriers' Bureau Committee ("HGCBC" or "the Bureau") for clarification of the agency's decision terminating its approval of motor carrier bureau agreements under 49 U.S.C. 13703(c).

BACKGROUND

[1] By decision served on May 7, 2007, the Board terminated its approval of all outstanding motor carrier bureau agreements under 49 U.S.C. 13703(c) – the agreements of 11 motor carrier rate bureaus and the agreement of the National Classification Committee (NCC). The Board concluded under section 13703(c)(1) that termination of these agreements was necessary to protect the public interest, particularly the public's interest in reasonable rates for shippers. The agency also found that terminating antitrust immunity would not have an adverse effect on motor carrier efficiency or profitability or other objectives of the motor carrier transportation policy set forth in 49 U.S.C. 13101 (a). The agency stated that it would now be incumbent upon the bureaus to determine the extent to which their present activities comply with the antitrust laws or would need to be reformed. To the extent the bureaus are uncertain about their exposure to antitrust liability, the Board encouraged them to consult advisors regarding the bounds of permissible activity and to take advantage of the business review procedure administered by the Antitrust Division of the United States Department of Justice (DOJ).

By petition filed on July 17, 2007, HGCBC requests that the Board clarify its decision to provide that HGCBC carriers may adopt, on an individual basis, tariffs that were established collectively by the HGCBC before termination of Board approval of its bureau agreement. HGCBC would have the Board state that it sees no potential antitrust problems with such actions. HGCBC further requests that the Board clarify its decision specifically to permit individual HGCBC carriers to use the Bureau as a publishing agent to establish individual tariffs going forward.

On August 8, 2007, a reply in opposition to the Bureau's petition was filed by NASSTRAC, Inc. (NASSTRAC).

DISCUSSION AND CONCLUSIONS

While we appreciate the challenges to HGCBC and its member carriers in transitioning from collective to individual pricing, we decline to grant HGCBC's clarification request. As explained in Periodic Review Proceeding, the time has come to complete this final step of making the motor carrier industry fully competitive, with all the attendant public benefits, by terminating our approval of the bureau agreements and the antitrust immunity conferred by that approval. We decline to make the requested clarification, because doing so could provide a partial shield over behavior that the Board concluded should be fully subject to the antitrust laws, in particular the Sherman Act's prohibition of unreasonable restraints of trade. While the Board is guided by both the Sherman Act and the Clayton Act in administering the Interstate Commerce Act and can address horizontal pricing issues in certain circumstances,[2] the Board has not been delegated the authority to directly enforce the Sherman Act.[3] Rather, the authority to interpret the Sherman Act primarily resides in DOJ and the federal courts.

In support of its request, HGCBC cites two decisions by our predecessor agency, the Interstate Commerce Commission (ICC), in which the ICC dealt with the issue of transition by stating that individual members of the rate bureaus involved in those decisions could continue to use tariffs that had been collectively established before the bureaus that established them lost antitrust immunity.[4] In each of those prior cases, the bureaus were given relatively short periods of time in which to adapt to the loss of immunity.[5] In this proceeding, however, we are taking a different approach in dealing with transitional issues by providing an extended period of time before our termination becomes effective so

that bureaus and their member carriers may take advantage of the business review procedure administered by DOJ's Antitrust Division or consult other experts regarding how to transition under the antitrust laws. As noted by NASSTRAC, our approach is consistent with other recent government action involving antitrust and transportation.[6]

Our denial of HGCBC's petition should not be read as a suggestion by the Board that the activities that are subject to the clarification request would in fact violate the Sherman Act. While we appreciate that some uncertainty may continue to exist, we emphasize that the boundary between permissible pricing behavior and pricing that may violate the Sherman Act is best drawn by the antitrust enforcement agencies and the federal courts. As the ICC stated in Fresh Fruits, "[v]iolation of the antitrust laws is a risk inherent in operating in a deregulated environment and one which presumably [parties] will weigh in electing an appropriate method of [quoting rates]."[7] Accordingly, we decline to issue further clarification as sought by HGCBC.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. HGCBC's petition for clarification is denied.

2. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

---

[1] Motor Carrier Bureaus – Periodic Review Proceeding, STB Ex Parte No. 656, et al. (STB served May 7, 2007) (Periodic Review Proceeding), corrected (STB served May 16, 2007).

[2] See DHX, Inc. v. STB, Civ. Action No. 05-74592 (9th Cir. Aug. 30, 2007) (noting that the Board had "ample statutory authority" to address oligopoly pricing issues with regard to water carrier non-contiguous domestic trade).

[3] McLean Trucking Co. v. United States, 321 U.S. 67, 79 (1944).

[4] See Household Goods Forwarders Tariff Bureau – Agreement, Section 5a Application No. 106 (1991 WL 120330) (ICC), at *6, aff'd, Household Goods Forwarders Tariff Bureau v. ICC, 968 F.2d 81 (D.C. Cir. 1982) (Freight forwarder bureau losing antitrust immunity was allowed to amend its collective rate tariffs to make them apply to individual forwarders in order "to smooth the transition to competitive individual forwarder ratemaking."); and Rail General Exemption Authority – Fresh Fruits and Vegetables, 361 I.C.C. 374, 376 (1979) (Concerning rate quotations by railroads losing antitrust

immunity due to the exemption of commodity, the ICC stated, "[w]e see no potential antitrust problems with referring to tariffs in existence prior to the effective date of the exemption.") (Fresh Fruits).

[5]

There were 2 months between the decision and the effective date in the case of the Household Goods Forwarders Tariff Bureau. In Fresh Fruits, the decision denying a request that the ICC confer antitrust immunity for the purpose of tariff reference appears to have been effective on the date of the issuance.

[6]

See the Final Order issued March 30, 2007, by the Office of the Secretary of Transportation in Docket No. OST-2006-25307, terminating the antitrust immunity of International Air Transport Association as to air passenger and cargo service between the United States and Europe.

[7]

See Fresh Fruits at 376.

ATTACHMENT C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of	)	
	)	
ALABAMA TRUCKING ASSOCIATION, INC.,	)	**Docket No. 9307**
	)	
a corporation.	)	
	)	

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its Complaint charging the Alabama Trucking Association, Inc. ("ATA"), hereinafter sometimes referred to as "Respondent," with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondent having been served with a copy of that Complaint, together with a Notice of Contemplated Relief; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Commission Rule 3.25(c), 16 C.F.R. § 3.25(c); and

The Commission having thereafter considered the matter and thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Alabama Trucking Association, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 660 Adams Avenue, Montgomery, Alabama 36104.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, for the purposes of this Order, the following definitions shall apply:

A. "Respondent" or "ATA" means the Alabama Trucking Association, Inc., its officers, executive board, committees, parents, representatives, agents, employees, successors and assigns;

B. "Carrier" means a common carrier of property by motor vehicle;

C. "Intrastate transportation" means the pickup or receipt, transportation and delivery of property hauled between points within the State of Alabama for compensation by a carrier authorized by the Alabama Public Service Commission to engage therein;

D. "Member" means any carrier or other person that pays dues or belongs to ATA or to any successor corporation;

E. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the State of Alabama, including updates, revisions, and/or amendments, including general rules and regulations;

F. "Rate" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service;

G. "Collective rates" means any rate or charge established under any contract, agreement, understanding, plan, program, combination or conspiracy between two or more

competing carriers, or between any two or more carriers and Respondent; and

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED that Respondent, its successors and assigns, and its officers, agents, representatives, directors and employees, directly or through any corporation, subsidiary, division or other device, shall forthwith cease and desist from entering into and within 120 days after service upon it of this Order cease and desist from adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize, raise, maintain or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods or equipment, including, but not limited to:

1. Knowingly preparing, developing, disseminating or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods or equipment;

2. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;

3. Inviting, coordinating or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment;

4. Suggesting, urging, encouraging, persuading or in any way influencing members to charge, file or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;

5. Maintaining any rate or tariff committee or other entity to consider, pass upon or discuss intrastate rates or rate proposals; and

6. Preparing, developing, disseminating or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

III.

IT IS FURTHER ORDERED that Respondent shall, within 120 days after service upon it of this Order:

1. Cancel all tariffs and any supplements thereto on file with the Alabama Public Service Commission that establish rates for transportation of property or related services, goods or equipment by common carriers in the State of Alabama and take such action as may be necessary to effectuate cancellation and withdrawal;

2. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the State of Alabama;

3. Cancel those provisions of its articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy that has the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Order; and

4. Amend its by-laws to require members of ATA to observe the provisions of the Order as a condition of membership in ATA.

IV.

IT IS FURTHER ORDERED that, within fifteen (15) days after service upon it of this Order, Respondent shall mail or deliver a copy of this Order, under cover of the letter attached hereto as "Appendix," to each current member of Respondent engaged in the transportation of household goods, and for a period of three (3) years from the date of service of this Order, to each new member engaged in the transportation of household goods within ten (10) days of each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED that Respondent notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date of service of this Order, and annually on the anniversary date of the original report for

each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date on which it was issued by the Commission.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

APPENDIX

(Letterhead of the Alabama Trucking Association, Inc.)

Dear Member:

The Federal Trade Commission has ordered the Alabama Trucking Association, Inc. ("ATA") to cease and desist its tariff and collective rate-making activities. A copy of the Commission Decision and Order is enclosed.

In order that you may readily understand the terms of the Order, we have set forth its essential provisions, although you must realize that the Order itself is controlling, rather than the following explanation of its provisions:

(1) The ATA is prohibited from engaging in any collective rate-making activities, including the proposal, development or filing of tariffs which contain any collectively formulated rates for intrastate transportation services. Each member carrier must independently set its own rates for transportation of property or related services, goods or equipment between points within the State of Alabama, but may use ATA as a tariff publishing agent.

(2) ATA is prohibited from providing a forum for its members for the purpose of discussing rates.

(3) ATA is prohibited from urging, suggesting, encouraging or in any way attempting to influence the rates members charge for their intrastate transportation services; ATA may not provide non-public information to any carrier about rate changes ordered by another carrier.

(4) ATA is prohibited from maintaining any rate or tariff committee which discusses or formulates intrastate rates or rate proposals.

(5) ATA is given 120 days to cancel all tariffs and tariff supplements currently in effect and on file at the Alabama Public Service Commission which were prepared, developed or filed by ATA.

(6) ATA is required to amend its by-laws to require its members to observe the provisions of the Order as a condition of membership in ATA.

Sincerely yours,

[appropriate ATA officer]

ATTACHMENT D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Timothy J. Muris, Chairman
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of	)	
MOVERS CONFERENCE OF MISSISSIPPI, INC.,	)	**Docket No. 9308**
a corporation.	)	

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its Complaint charging the Movers Conference of Mississippi, Inc. ("MCM"), hereinafter sometimes referred to as "Respondent," with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Respondent having been served with a copy of that Complaint, together with a Notice of Contemplated Relief; and

Respondent and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Commission Rule 3.25(c), 16 C.F.R. § 3.25(c); and

The Commission having thereafter considered the matter and thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Movers Conference of Mississippi, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at P.O. Box 961, Jackson, Mississippi.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, for the purposes of this Order, the following definitions shall apply:

A. "Respondent" or "MCM" means the Movers Conference of Mississippi, Inc., its officers, executive board, committees, parents, representatives, agents, employees, successors and assigns;

B. "Carrier" means a common carrier of property by motor vehicle;

C. "Intrastate transportation" means the pickup or receipt, transportation and delivery of property hauled between points within the State of Mississippi for compensation by a carrier authorized by the Mississippi Public Service Commission to engage therein;

D. "Member" means any carrier or other person that pays dues or belongs to MCM or to any successor corporation;

E. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the State of Mississippi, including updates, revisions, and/or amendments, including general rules and regulations;

F. "Rate" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service;

G. "Collective rates" means any rate or charge established under any contract, agreement, understanding, plan, program, combination or conspiracy between two or more

competing carriers, or between any two or more carriers and Respondent; and

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED that Respondent, its successors and assigns, and its officers, agents, representatives, directors and employees, directly or through any corporation, subsidiary, division or other device, shall forthwith cease and desist from entering into and within 120 days after service upon it of this Order cease and desist from adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize, raise, maintain or otherwise interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods or equipment, including, but not limited to:

1. Knowingly preparing, developing, disseminating or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods or equipment;

2. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;

3. Inviting, coordinating or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment;

4. Suggesting, urging, encouraging, persuading or in any way influencing members to charge, file or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;

5. Maintaining any rate or tariff committee or other entity to consider, pass upon or discuss intrastate rates or rate proposals; and

6. Preparing, developing, disseminating or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

III.

IT IS FURTHER ORDERED that Respondent shall, within 120 days after service upon it of this Order:

1. Cancel all tariffs and any supplements thereto on file with the Mississippi Public Service Commission that establish rates for transportation of property or related services, goods or equipment by common carriers in the State of Mississippi and take such action as may be necessary to effectuate cancellation and withdrawal;

2. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the State of Mississippi;

3. Cancel those provisions of its articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy that has the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Order; and

4. Amend its by-laws to require members of MCM to observe the provisions of the Order as a condition of membership in MCM.

IV.

IT IS FURTHER ORDERED that, within fifteen (15) days after service upon it of this Order, Respondent shall mail or deliver a copy of this Order, under cover of the letter attached hereto as "Appendix," to each current member of Respondent engaged in the transportation of household goods, and for a period of three (3) years from the date of service of this Order, to each new member engaged in the transportation of household goods within ten (10) days of each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED that Respondent notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date of service of this Order, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on December 4, 2023.

By the Commission, Commissioner Harbour not participating.

Donald S. Clark
Secretary

SEAL

ISSUED: December 4, 2003

APPENDIX

(Letterhead of the Movers Conference of Mississippi, Inc.)

Dear Member:

The Federal Trade Commission has ordered the Movers Conference of Mississippi, Inc. ("MCM") to cease and desist its tariff and collective rate-making activities. A copy of the Commission Decision and Order is enclosed.

In order that you may readily understand the terms of the Order, we have set forth its essential provisions, although you must realize that the Order itself is controlling, rather than the following explanation of its provisions:

(1) The MCM is prohibited from engaging in any collective rate-making activities, including the proposal, development or filing of tariffs which contain any collectively formulated rates for intrastate transportation services. Each member carrier must independently set its own rates for transportation of property or related services, goods or equipment between points within the State of Mississippi, but may use MCM as a tariff publishing agent.

(2) MCM is prohibited from providing a forum for its members for the purpose of discussing rates.

(3) MCM is prohibited from urging, suggesting, encouraging or in any way attempting to influence the rates members charge for their intrastate transportation services; MCM may not provide non-public information to any carrier about rate changes ordered by another carrier.

(4) MCM is prohibited from maintaining any rate or tariff committee which discusses or formulates intrastate rates or rate proposals.

(5) MCM is given 120 days to cancel all tariffs and tariff supplements currently in effect and on file at the Mississippi Public Service Commission which were prepared, developed or filed by MCM.

(6) MCM is required to amend its by-laws to require its members to observe the provisions of the Order as a condition of membership in MCM.

Sincerely yours,

[appropriate MCM officer]

ATTACHMENT E

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

In the Matter of	)	
KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.,	)	**Docket No. 9309**
a corporation.	)	

FINAL ORDER

This matter having been heard by the Commission upon the appeal of Respondent, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED THAT the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions of law contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED THAT the following Order to cease and desist be, and it hereby is, entered:

ORDER

I.

IT IS ORDERED THAT, for the purposes of this Order, the following definitions shall apply:

A. "Respondent" or "KHGCA" means the Kentucky Household Goods Carriers Association, Inc., its officers, executive board, committees, parents, representatives, agents, employees, successors, and assigns;

B. "Carrier" means a common carrier of property by motor vehicle;

C. "Intrastate transportation" means the pickup or receipt, transportation, and delivery of property hauled between points within the Commonwealth of Kentucky for compensation by a carrier authorized by the Kentucky Transportation Cabinet's Division of Motor Carriers to engage therein;

D. "Member" means any carrier or other person that pays dues or belongs to KHGCA or to any successor corporation;

E. "Tariff" means the publication stating the rates of a carrier for the transportation of property between points within the Commonwealth of Kentucky, including updates, revisions, and/or amendments, including general rules and regulations;

F. "Rate" means a charge, payment, or price fixed according to a ratio, scale, or standard for direct or indirect transportation service;

G. "Collective rates" means any rate or charge established under any contract, agreement, understanding, plan, program, combination, or conspiracy between two or more competing carriers, or between any two or more carriers and Respondent; and

H. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

IT IS FURTHER ORDERED THAT Respondent, its successors and assigns, and its officers, agents, representatives, directors, and employees, directly or through any corporation, subsidiary, division, or other device, shall immediately cease and desist from entering into, and shall, within 120 days after this Order becomes final, cease and desist from adhering to or maintaining, directly or indirectly, any contract, agreement, understanding, plan, program, combination, or conspiracy to fix, stabilize, raise, maintain, or otherwise

interfere or tamper with the rates charged by two or more carriers for the intrastate transportation of property or related services, goods, or equipment, including, but not limited to:

A. Knowingly preparing, developing, disseminating, or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods, or equipment;

B. Providing information to any carrier about rate changes considered or made by any other carrier employing the publishing services of Respondent prior to the time at which such rate change becomes a matter of public record;

C. Inviting, coordinating, or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods, or equipment;

D. Suggesting, urging, encouraging, persuading, or in any way influencing members to charge, file, or adhere to any existing or proposed tariff provision which affects rates, or otherwise to charge or refrain from charging any particular price for any services rendered or goods or equipment provided;

E. Maintaining any rate or tariff committee or other entity to consider, pass upon, or discuss intrastate rates or rate proposals; and

F. Preparing, developing, disseminating, or filing a proposed or existing tariff containing automatic changes to rates charged by two or more carriers.

III.

IT IS FURTHER ORDERED THAT Respondent shall, within 120 days after this Order becomes final:

A. Take such action pursuant to the laws of the Commonwealth of Kentucky as may be necessary to effectuate the cancellation and withdrawal of all tariffs and any supplements thereto on file with the Kentucky Transportation Cabinet's Division of Motor Carriers that establish rates for transportation of property or related services, goods, or equipment by common carriers in the Commonwealth of Kentucky;

B. Terminate all previously executed powers of attorney and rate and tariff service agreements, between it and any carrier utilizing its services, authorizing the publication and/or filing of intrastate collective rates within the Commonwealth of Kentucky;

C. Take action pursuant to the laws of the Commonwealth of Kentucky to cancel those provisions of its articles of incorporation, by-laws, and procedures and every other rule, opinion, resolution, contract, or statement of policy that has the purpose or effect of permitting, announcing, stating, explaining, or agreeing to any business practice enjoined by the terms of this Order; and

D. Take action pursuant to the laws of the Commonwealth of Kentucky to amend its by-laws to require members of KHGCA to observe the provisions of this Order as a condition of membership in KHGCA.

IV.

IT IS FURTHER ORDERED THAT Respondent shall mail or deliver a copy of this Order (A) to each current member of Respondent engaged in the transportation of household goods within 75 days after this Order becomes final, and (B) to each new member engaged in the transportation of household goods within ten (10) days after each such member's acceptance by Respondent.

V.

IT IS FURTHER ORDERED THAT Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation which may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED THAT Respondent shall file a written report within 180 days after this Order becomes final, and annually on the anniversary date of the original report, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which Respondent has complied with this Order.

VII.

IT IS FURTHER ORDERED THAT this Order shall terminate twenty (20) years after the date on which this Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: June 21, 2005

ATTACHMENT F

Caution
As of: Jun 17, 2009

FEDERAL TRADE COMMISSION, PETITIONER v. TICOR TITLE INSURANCE COMPANY, ET AL.

No. 91-72

SUPREME COURT OF THE UNITED STATES

504 U.S. 621*; *112 S. Ct. 2169*; *119 L. Ed. 2d 410*; *1992 U.S. LEXIS 3544*; *60 U.S.L.W. 4515*; *1992-1 Trade Cas. (CCH) P69,847*; *92 Cal. Daily Op. Service 4915*; *92 Daily Journal DAR 8322*; *6 Fla. L. Weekly Fed. S 365

January 13, 1992, Argued
June 12, 1992, Decided

PRIOR HISTORY: On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

DISPOSITION: *922 F.2d 1122*, reversed and remanded.

DECISION:

Supervision by states of title-search ratesetting held not sufficiently active to give title insurance companies state-action immunity from federal antitrust liability.

SUMMARY:

Under the state-action doctrine established by United States Supreme Court precedents, a state law or regulatory scheme can be the basis for immunity from the federal antitrust laws if the state (1) has articulated a clear and affirmative policy to allow anticompetitive conduct, and (2) provides active supervision of anticompetitive conduct undertaken by private actors. The Federal Trade Commission (FTC) filed an administrative complaint against various title insurance companies and charged the companies with violating 5(a)(1) of the Federal Trade Commission Act (*15 USCS 45(a)(1)*) in Arizona, Connecticut, Montana, and Wisconsin, by engaging in horizontal price fixing, through privately organized rating bureaus, of their fees for title searches, examinations, and settlements. In considering the companies' defense that their rate-fixing activities were entitled to state-action immunity, an Administrative Law Judge (ALJ) found, in part, that (1) in each of the four states, the rating bureau was licensed by the state and authorized to establish joint rates for its members, which rates would become effective unless the state rejected them within a specified period; and (2) although this system provided a theoretical mechanism for substantive state review, rate filings in the four states had in fact been subject to only minimal scrutiny by state regulators. The FTC conceded that the affirmative-policy test for state-action immunity had been met in all four states, and the ALJ concluded that the active-supervision test had been met in Arizona and Montana, but not in Connecticut or Wisconsin. On review, the FTC (1) held that none of the four states had conducted active supervision, so that the companies were not entitled to immunity in any of those states; and (2) found antitrust violations in those states (*112 FTC 1122*). However, the FTC's order was vacated by the United States Court of Appeals for the Third Circuit, which (1) held that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfies the requirement of active supervision; and (2) concluded that the companies' conduct was entitled to state-action immunity in all four states (*922 F2d 1122*). The Supreme Court granted certiorari to consider the questions (1) whether the Court of Appeals was correct in its statement of law and in its application of law to

fact--as to which question the parties confined their briefing to the regulatory regimes of Montana and Wisconsin--and (2) whether the Court of Appeals exceeded its authority in departing from the factual findings made by the ALJ and adopted by the FTC--as to which question the parties focussed their briefing on the regulatory regimes of *Arizona and Connecticut (502 US 807, 116 L Ed 2d 25, 112 S Ct 47)*.

On certiorari, the Supreme Court reversed the judgment of the Court of Appeals as to the first question, and remanded for further proceedings as to the second question. In an opinion by Kennedy, J., joined by White, Blackmun, Stevens, Scalia, and Souter, JJ., it was held that (1) both elements of the above state-action immunity test must be complied with, and not only the "clear articulation" requirement; (2) in order to satisfy the "active supervision" requirement, parties claiming state-action immunity where prices or rates are set as an initial matter by private parties, subject only to a veto if the state chooses to exercise it, must show that state officials have undertaken the necessary steps to determine the specifics of the price fixing or ratesetting scheme, and the mere potential for state supervision is not an adequate substitute for a decision by the state; (3) under this standard, there was no "active supervision" by state officials in Montana and Wisconsin, and the actions of the companies in those states were therefore not immune from antitrust liability, where (a) in both states, the applicable regulatory schemes allowed rates filed by the rating bureaus with state agencies to become effective unless they were rejected by state officials within a specified time, and (b) the potential for state supervision under this "negative option" rule was not realized in fact, as (i) rate filings in those states were at most checked for mathematical accuracy, while some were unchecked altogether, (ii) a rate filing became effective in Montana despite the failure of the rating bureau to provide additional information requested by state officials, and (iii) in Wisconsin, additional information requested by state officials was provided after a lapse of 7 years, during which time the rate filing remained in effect; and (4) the case would be remanded to give the Court of Appeals an opportunity to re-examine its determinations with respect to Arizona and Connecticut.

Scalia, J., concurred, expressing the view that, while the Supreme Court's standard of "active supervision" would be a source of uncertainty and litigation, these consequences were acceptable because (1) the standard was compelled by the "active supervision" doctrine, which had not been challenged in the case at hand; and (2) the antitrust exemption for state-programmed private collusion was dubious in the first place.

Rehnquist, Ch. J., joined by O'Connor and Thomas, JJ., dissented, expressing the view that (1) the Court of Appeals followed the correct standard in applying the "active supervision" requirement; and (2) the different conclusion reached by the Court of Appeals by reviewing the facts in light of this standard did not constitute a rejection of the FTC's factual findings.

O'Connor, J., joined by Thomas, J., dissented, expressing the view that (1) the practical effect of the majority's interpretation of the "active supervision" requirement would be to diminish states' regulatory flexibility by eliminating "negative option" regulatory schemes such as those of the states in question; (2) liability under the antitrust laws should not depend on how enthusiatically state officials carried out their statutory duties, a circumstance over which regulated entities had no control; and (3) the majority's opinion offered no guidance as to what level of supervision would suffice.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5

state-action immunity --

Headnote:[1A][1B][1C][1D]

A state law or regulatory scheme cannot be the basis for antitrust immunity unless (1) the state has articulated a clear and affirmative policy to allow the anticompetitive conduct, and (2) the state provides active supervision of anticompetitive conduct undertaken by private actors; thus, while a state may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the state and implemented in specific details; both elements of the above test must be complied with, and not only the "clear articulation" requirement, as (1) both elements are directed at insuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy, (2) meeting the clear articulation requirement (a) shows little more than that the state has not acted through inadvertence, and (b) cannot alone insure that particular anticompetitive conduct has been approved by the state, and (3) sole reliance on the clear articulation requirement will not allow the regulatory flexibility that states deem necessary, as states' freedom of action will be impeded if they risk triggering state-action immunity whenever they enter the realm of economic regulation.

[***LEdHN2]

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §37

state-action immunity -- price fixing -- title examination rates --

Headnote:[2A][2B]

Parties claiming state-action immunity from the federal antitrust laws where prices or rates are set as an initial matter by private parties, and remain in effect unless the state chooses to exercise a veto, must show that state officials have undertaken the necessary steps to determine the specifics of the price fixing or ratesetting scheme, and the mere potential for state supervision is not an adequate substitute for a decision by the state; under this standard, there is no "active supervision" by state officials, as would be required for the application of state-action immunity, with respect to alleged horizontal price fixing in two states by title insurance companies which set uniform rates for title searches, examinations, and settlements through privately established rating bureaus, where (1) in both states, the applicable regulatory schemes allow rates filed by the rating bureaus with state agencies to become effective unless they are rejected by state officials within a specified time, and (2) the potential for state supervision under this "negative option" rule was not realized in fact, as (a) rate filings in those states were at most checked for mathematical accuracy, while some were unchecked altogether, (b) in one state a rate filing became effective despite the failure of the rating bureau to provide additional information requested by state officials, and (c) in the other state, additional information requested by state officials was provided after a lapse of 7 years, during which time the rate filing remained in effect; therefore, a Federal Court of Appeals errs in vacating, on state-action immunity grounds, a Federal Trade Commission order which found that the companies' conduct in the two states violated 5(a)(1) of the Federal Trade Commission Act (*15 USCS 45(a)(1)*). (Rehnquist, Ch. J., and O'Connor and Thomas, JJ., dissented from this holding.)

[***LEdHN3]

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5

state-action immunity -- active supervision -- price fixing --

Headnote:[3]

Under the doctrine of state-action immunity from the federal antitrust laws, the purpose of the inquiry into whether the state has actively supervised the anticompetitive conduct undertaken by private actors as to setting of rates or prices is not to determine whether the state has met some normative standard, such as efficiency, in its regulatory practices, but to determine whether the state has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties; the question is not how well state regulation works, but whether the anticompetitive scheme is the state's own. (Rehnquist, Ch. J., and O'Connor and Thomas, JJ., dissented in part from this holding.)

[***LEdHN4]

APPEAL §1339.5

review of Federal Court of Appeals -- certiorari --

Headnote:[4]

The United States Supreme Court--in reviewing on certiorari a Federal Court of Appeals decision which (1) ruled that title insurance companies engaging in horizontal price fixing, through privately organized rating bureaus, of their fees for title searches, examinations, and settlements, were entitled to state-action immunity from the federal antitrust laws in certain states, and therefore (2) vacated a Federal Trade Commission (FTC) order holding that the companies' conduct violated 5(a)(1) of the Federal Trade Commission Act (FTCA) (*15 USCS 45(a)(1)*)--need not determine whether state-action immunity applies to FTC action under 5 of the FTCA, where the FTC, though it has argued at other times that state-action immunity does not apply in such cases, has not asserted any superior pre-emption authority in the instant matter.

[***LEdHN5]

APPEAL §1692.3

remand -- error of law --

Headnote:[5]

The United States Supreme Court--in reviewing on certiorari a Federal Court of Appeals' judgment vacating a Federal Trade Commission (FTC) order which found that title insurance companies had violated 5(a)(1) of the Federal Trade Commission Act (*15 USCS 45(a)(1)*) in Arizona, Connecticut, Montana, and Wisconsin by setting fees for title searches, examinations, and settlements through privately established rating bureaus, as the Court of Appeals ruled that the companies were entitled to state-action immunity from federal antitrust liability in those states because the bureaus' rate filings were subject to veto by state officials--will remand the case to the Court of Appeals for re-examination of its determinations with respect to Arizona and Connecticut, where (1) the Supreme Court granted certiorari to consider the questions (a) whether the Court of Appeals was correct in its statement of law and in its application of law to fact, as to which question the parties confined their

briefing to the regulatory regimes of Montana and Wisconsin, and (b) whether the Court of Appeals exceeded its authority in departing from the factual findings made by the Administrative Law Judge and adopted by the FTC as to the extent of state supervision, as to which the parties focussed on the regulatory regimes of Connecticut and Arizona; and (2) the Supreme Court held that (a) the Court of Appeals erred in its interpretation of the active-supervision element of the state-action immunity doctrine, and (b) the acts of the companies in Montana and Wisconsin were not immune from antitrust liability. (Rehnquist, Ch. J., and O'Connor and Thomas, JJ., dissented from this holding.)

SYLLABUS

Petitioner Federal Trade Commission filed an administrative complaint charging respondent title insurance companies with horizontal price fixing in setting fees for title searches and examinations in violation of § 5(a)(1) of the Federal Trade Commission Act. In each of the four States at issue -- Connecticut, Wisconsin, Arizona, and Montana -- uniform rates were established by a rating bureau licensed by the State and authorized to establish joint rates for its members. Rate filings were made to the state insurance office and became effective unless the State rejected them within a specified period. The Administrative Law Judge held, *inter alia*, that the rates had been fixed in all four States, but that, in Wisconsin and Montana, respondents' anticompetitive activities were entitled to state-action immunity, as contemplated in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307*, and its progeny. Under this doctrine, a state law or regulatory scheme can be the basis for antitrust immunity if the State (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937.* The Commission, which conceded that the first part of the test was met, held on review that none of the States had conducted sufficient supervision to warrant immunity. The Court of Appeals reversed, holding that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement. Thus, it concluded, respondents' conduct in all the States was entitled to state-action immunity.

Held:

1. State-action immunity is not available under the regulatory schemes in Montana and Wisconsin. Pp. 632-640.

(a) Principles of federalism require that federal antitrust laws be subject to supersession by state regulatory programs. *Parker, supra, at 350-352; Midcal, supra; Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658. Midcal's* two-part test confirms that States may not confer antitrust immunity on private persons by fiat. Actual state involvement is the precondition for immunity, which is conferred out of respect for the State's ongoing regulation, not the economics of price restraint. The purpose of the active supervision inquiry is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention. Although this immunity doctrine was developed in actions brought under the Sherman Act, the issue whether it applies to Commission action under the Federal Trade Commission Act need not be determined, since the Commission does not assert any superior preemption authority here. Pp. 632-635.

(b) Wisconsin, Montana, and 34 other States correctly contend that a broad interpretation of state-action immunity would not serve their best interests. The doctrine would impede, rather than advance, the States' freedom of action if it required them to act in the shadow of such immunity whenever they entered the realm of economic regulation. Insistence on real compliance with both parts of the *Midcal* test serves to make clear that the States are responsible for only the price fixing they have sanctioned and undertaken to control. Respondents' contention that such concerns are better addressed by the first part of the *Midcal* test misapprehends the close relation between *Midcal*'s two elements, which are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. A clear policy statement ensures only that the State did not act through inadvertence, not that the State approved the anticompetitive conduct. Sole reliance on the clear articulation requirement would not allow the States sufficient regulatory flexibility. Pp. 635-637.

(c) Where prices or rates are initially set by private parties, subject to veto only if the State chooses, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for the State's decision. Thus, the standard relied on by the Court of Appeals in this case is insufficient to establish the requisite level of active supervision. The Commission's findings of fact demonstrate that the potential for state supervision was not realized in either Wisconsin or Montana. While most rate filings were checked for mathematical accuracy, some were unchecked altogether. Moreover, one rate filing became effective in Montana despite the rating bureau's failure to provide requested information, and additional information was provided in Wisconsin after seven years, during

which time another rate filing remained in effect. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And state judicial review cannot fill the void. See *Patrick, supra, at 103-105*. This Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721*, which involved a similar negative option regime, is not to the contrary, since it involved the question whether the first part of the *Midcal* test was met. This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact, and it should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. Pp. 637-640.

2. The Court of Appeals should have the opportunity to reexamine its determinations with respect to Connecticut and Arizona in order to address whether it accorded proper deference to the Commission's factual findings as to the extent of state supervision in those States. P. 640.

COUNSEL: Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were Solicitor General Starr, Assistant Attorney General Rill, Robert A. Long, Jr., James M. Spears, Jay C. Shaffer, Ernest J. Isenstadt, Michael E. Antalics, and Ann Malester.

John C. Christie, Jr., argued the cause for respondents. With him on the brief were Patrick J. Roach, John F. Graybeal, and David M. Foster. *

* A brief of amici curiae urging reversal was filed for the State of Wisconsin et al. by James E. Doyle, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, and Robert N. McDonald and Ellen S. Cooper, Assistant Attorneys General, James H. Evans, Attorney General of Alabama, Charles E. Cole, Attorney General of Alaska, and James Forbes, Assistant Attorney General, Grant Woods, Attorney General of Arizona, and Jeri K. Auther, Assistant Attorney General, Winston Bryant, Attorney General of Arkansas, and Royce Griffin, Deputy Attorney General, Charles M. Oberly III, Attorney General of Delaware, Robert A. Butterworth, Attorney General of Florida, Larry EchoHawk, Attorney General of Idaho, and Brett T. DeLange, Deputy Attorney General, Bonnie J. Campbell, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Frederic J. Cowan, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Jesse James Marks and Anne F. Benoit, Assistant Attorneys General, Michael E. Carpenter, Attorney General of Maine, and Stephen L. Wessler, Deputy Attorney General, Scott Harshbarger, Attorney General of Massachusetts, and George K. Weber and Thomas M. Alpert, Assistant Attorneys General, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Mike Moore, Attorney General of Mississippi, Marc Racicot, Attorney General of Montana, Frankie Sue Del Papa, Attorney General of Nevada, John P. Arnold, Attorney General of New Hampshire, Charles T. Putnam, Senior Assistant Attorney General, and Walter L. Maroney, Assistant Attorney General, Robert J. Del Tufo, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, Jerry Boone, Solicitor General, and George W. Sampson and Richard Schwartz, Assistant Attorneys General, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Nicholas J. Spaeth, Attorney General of North Dakota, and David W. Huey, Assistant Attorney General, Lee Fisher, Attorney General of Ohio, and Marc B. Bandman, Assistant Attorney General, Susan B. Loving, Attorney General of Oklahoma, and Jane F. Wheeler, Assistant Attorney General, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Thomas L. Welch, Chief Deputy Attorney General, and Carl S. Hisiro, Assistant Chief Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, and Edmund F. Murray, Jr., Special Assistant Attorney General, Charles W. Burson, Attorney General of Tennessee, John Knox Walkup, Solicitor General, and Perry A. Craft, Deputy Attorney General, Dan Morales, Attorney General of Texas, Will Pryor, First Assistant Attorney General, Mary F. Keller, Deputy Attorney General, and Mark Tobey, Assistant Attorney General, R. Paul Van Dam, Attorney General of Utah, Jeffrey L. Amestoy, Attorney General of Vermont, and Geoffrey A. Yudien, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, Mario J. Palumbo, Attorney General of West Virginia, and Donald L. Darling, Deputy Attorney General, and Joseph B. Meyer, Attorney General of Wyoming.

Briefs of amici curiae urging affirmance were filed for the State of California et al. by Da-

niel E. Lungren, Attorney General of California, Roderick E. Walston, Chief Assistant Attorney General, and Thomas F. Gede, Special Assistant Attorney General, Gale A. Norton, Attorney General of Colorado, Don Stenberg, Attorney General of Nebraska, and Mark W. Barnett, Attorney General of South Dakota; for the American Insurance Association et al. by John E. Nolan, Craig A. Berrington, James H. Bradner, Jr., Theresa L. Sorota, and Patrick J. McNally; for Hartford Fire Insurance Co. et al. by Stephen M. Shapiro, Mark I. Levy, Andrew J. Pincus, and Roy T. Englert, Jr.; and for the National Council on Compensation Insurance by Jerome A. Hochberg and Mark E. Solomons.

Briefs of amici curiae were filed for the American Land Title Association by Philip H. Rudolph and James R. Maher; and for the Pennsylvania Electric Association by Jeffrey H. Howard.

JUDGES: KENNEDY, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, SCALIA, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, post, p. 640. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, post, p. 641. O'CONNOR, J., filed a dissenting opinion, in which THOMAS, J., joined, post, p. 646.

OPINION BY: KENNEDY

OPINION

[*624] [***417] [**2172] JUSTICE KENNEDY delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]The Federal Trade Commission filed an administrative complaint against six of the Nation's largest title insurance [*625] companies, alleging horizontal price fixing in their fees for title searches and title examinations. One company settled by consent decree, while five other firms continue to contest the matter. The Commission charged the title companies with violating § 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, *15 U. S. C. § 45(a)(1)*, which prohibits "unfair methods of competition in or affecting commerce." One of the principal defenses the companies assert is state-action immunity from antitrust prosecution, as contemplated in the line of cases beginning with *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. The Commission rejected this defense, *In re Ticor Title Ins. Co., 112 F.T.C. 344 (1989)*, and the firms sought review in [**2173] the United States Court of Appeals for the Third Circuit. Ruling that state-action immunity was available under the state regulatory schemes in question, the Court of Appeals reversed. *922 F.2d 1122 (1991)*. We granted certiorari. *502 U.S. 806 (1991)*.

I

Title insurance is the business of insuring the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers. Before issuing a title insurance [*626] policy, the insurance company or one of its agents performs a title search and examination. The search produces a chronological list of the public documents in the chain of title to the real property. The examination is a critical analysis or interpretation of the condition of title revealed by the documents disclosed through this search.

The title search and examination are major components of the insurance company's services. There are certain variances from State to State and from policy to policy, but a brief summary of the functions performed by the title companies can be given. The insurance companies exclude [***418] from coverage defects uncovered during the search; that is, the insurers conduct searches in order to inform the insured and to reduce their own liability by identifying and excluding known risks. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names. They are protected also against errors or mistakes in the search and examination. Negligence need not be proved in order to recover. Title insurance also includes the obligation to defend in the event that an insured is sued by reason of some defect within the scope of the policy's guarantee.

The title insurance industry earned $ 1.35 billion in gross revenues in 1982, and respondents accounted for 57 percent of that amount. Four of respondents are the nation's largest title insurance companies: Ticor Title Insurance Co., with 16.5 percent of the market; Chicago Title Insurance Co., with 12.8 percent; Lawyers Title Insurance Co., with 12 percent; and SAFECO Title Insurance Co. (now operating under the name Security Union Title Insurance Co.), with 10.3 percent. Stewart Title Guarantee Co., with 5.4 percent of the market, is the country's eighth largest title insurer, with a strong position in the West and Southwest. App. to Pet. for Cert. 145a.

[*627] The Commission issued an administrative complaint in 1985. Horizontal price fixing was alleged in these terms:

> "Respondents have agreed on the prices to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the respondents have fixed prices with other respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming." *112 F.T.C. at 346.*

The Commission did not challenge the insurers' practice of setting uniform rates for insurance against the risk of loss from defective titles, but only the practice of setting uniform rates for the title search, examination, and settlement, aspects of the business which, the Commission alleges, do not involve insurance.

Before the Administrative Law Judge (ALJ), respondents defended against liability on three related grounds. First, they maintained that the challenged conduct is exempt from antitrust scrutiny under the McCarran-Ferguson Act, 59 Stat. 34, *15 U. S. C. § 1012(b)*, which confers antitrust immunity [**2174] over the "business of insurance" to the extent regulated by state law. Second, they argued that their collective ratemaking activities are exempt under the *Noerr-Pennington* doctrine, which places certain "joint efforts to influence public officials" beyond the reach of the antitrust laws. *Mine Workers v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*. Third, respondents contended their activities are entitled to state-action immunity, which permits anticompetitive conduct if authorized [***419] and supervised by state officials. See *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937* [*628] *(1980)*; *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. App. to Pet. for Cert. 218a. As to one State, Ohio, respondents contended that the rates for title search, examination, and settlement had not been set by a rating bureau.

Title insurance company rates and practices in 13 States were the subject of the initial complaint. Before the matter was decided by the ALJ, the Commission declined to pursue its complaint with regard to fees in five of these States: Louisiana, New Mexico, New York, Oregon, and Wyoming. Upon the recommendation of the ALJ, the Commission did not pursue its complaint with regard to fees in two additional States, Idaho and Ohio. This left six States in which the Commission found antitrust violations, but in two of these States, New Jersey and Pennsylvania, the Commission conceded the issue on which certiorari was sought here, so the regulatory regimes in these two States are not before us. Four States remain in which violations were alleged: Connecticut, Wisconsin, Arizona, and Montana.

The ALJ held that the rates for search and examination services had been fixed in these four States. For reasons we need not pause to examine, the ALJ rejected the McCarran-Ferguson and *Noerr-Pennington* defenses. The ALJ then turned his attention to the question of state-action immunity. A summary of the ALJ's extensive findings on this point is necessary for a full understanding of the decisions reached at each level of the proceedings in the case.

Rating bureaus are private entities organized by title insurance companies to establish uniform rates for their members. The ALJ found no evidence that the collective setting of title insurance rates through rating bureaus is a way of pooling risk information. Indeed, he found no evidence that any title insurer sets rates according to actuarial loss experience. Instead, the ALJ found that the usual practice is for rating bureaus to set rates according to profitability studies that focus on the costs of conducting searches and examinations. Uniform rates are set notwithstanding differences in [*629] efficiencies and costs among individual members. App. to Pet. for Cert. 183a-184a.

The ALJ described the regulatory regimes for title insurance rates in the four States still at issue. In each one, the title insurance rating bureau was licensed by the State and authorized to establish joint rates for its members. Each of the four States used what has come to be called a "negative option" system to approve rate filings by the bureaus. Under a negative option system, the rating bureau filed rates for title searches and title examinations with the state insurance office. The rates became effective unless the State rejected them within a specified period, such as 30 days. Although the negative option system provided a theoretical mechanism for substantive review, the ALJ determined, after making detailed findings regarding the operation of each regulatory regime, that the rate filings were subject to minimal scrutiny by state regulators.

In Connecticut the State Insurance Department has the authority to audit the rating bureau and hold hearings regarding rates, but it has [***420] not done so. The Connecticut rating bureau filed only two major rate increases, in 1966 and in 1981. The circumstances

[**2175] behind the 1966 rate increase are somewhat obscure. The ALJ found that the Insurance Department asked the rating bureau to submit additional information justifying the increase, and later approved the rate increase although there is no evidence the additional information was provided. In 1981 the Connecticut rating bureau filed for a 20 percent rate increase. The factual background for this rate increase is better developed though the testimony was somewhat inconsistent. A state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau. The same official testified, however, that he lacked the authority to question certain expense data he considered quite high. *Id., at 189*a-195a.

[*630] In Wisconsin the State Insurance Commissioner is required to examine the rating bureau at regular intervals and authorized to reject rates through a process of hearings. Neither has been done. The Wisconsin rating bureau made major rate filings in 1971, 1981, and 1982. The 1971 rate filing was approved in 1971 although supporting justification, which had been requested by the State Insurance Commissioner, was not provided until 1978. The 1981 rate filing requested an 11 percent rate increase. The increase was approved after the office of the Insurance Commissioner checked the supporting data for accuracy. No one in the agency inquired into insurer expenses, though an official testified that substantive scrutiny would not be possible without that inquiry. The 1982 rate increase received but a cursory reading at the office of the Insurance Commissioner. The supporting materials were not checked for accuracy, though in the absence of an objection by the agency, the rate increase went into effect. *Id., at 196*a-200a.

In Arizona the Insurance Director was required to examine the rating bureau at least once every five years. It was not done. In 1980 the State Insurance Department announced a comprehensive investigation of the rating bureau. It was not conducted. The rating bureau spent most of its time justifying its escrow rates. Following conclusion in 1981 of a federal civil suit challenging the joint fixing of escrow rates, the rating bureau went out of business without having made any major rate filings, though it had proposed minor rate adjustments. *Id., at 200*a-205a.

In Montana the rating bureau made its only major rate filing in 1983. In connection with it, a representative of the rating bureau met with officials of the State Insurance Department. He was told that the filed rates could go into immediate effect though further profit data would have to be provided. The ALJ found no evidence that the additional data were furnished. *Id., at 211*a-214a.

[*631] To complete the background, the ALJ observed that none of the rating bureaus are now active. The respondents abandoned them between 1981 and 1985 in response to numerous private treble-damages suits, so by the time the Commission filed its formal complaint in 1985, the rating bureaus had been dismantled. *Id., at 195*a, 200a, 205a, 208a. The ALJ held that the case is not moot, though, because nothing would preclude respondents from resuming the conduct challenged by the Commission. *Id.*, at 246a-247a. See *United States v. W. T.* [***421] *Grant Co., 345 U.S. 629, 632-633, 97 L. Ed. 1303, 73 S. Ct. 894 (1953).*

[***LEdHR1B] [1B] These factual determinations established, the ALJ addressed the two-part test that must be satisfied for state-action immunity under the antitrust laws, the test we set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980).* A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors. *Id., at 105.* The Commission having conceded that the first part of the test was satisfied in the four States still at issue, the immunity question, beginning with the hearings before the ALJ [**2176] and in all later proceedings, has turned upon the proper interpretation and application of *Midcal*'s active supervision requirement. The ALJ found the active supervision test was met in Arizona and Montana but not in Connecticut or Wisconsin. App. to Pet. for Cert. 248a.

On review of the ALJ's decision, the Commission held that none of the four States had conducted sufficient supervision, so that the title companies were not entitled to immunity in any of those jurisdictions. *Id., at 47*a. The Court of Appeals for the Third Circuit disagreed with the Commission, adopting the approach of the First Circuit in *New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064 (1990)*, which [*632] had held that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the requirement of active supervision. *Id., at 1071.* Under this standard, the Court of Appeals for the Third Circuit ruled that the active state supervision requirement was met in all four States and held that the respondents' conduct was entitled to state-action immunity in each of them. *922 F.2d at 1140.*

We granted certiorari to consider two questions: First, whether the Third Circuit was correct in its statement of the law and in its application of law to fact, and second, whether the Third Circuit exceeded its authority by departing from the factual findings entered by the

ALJ and adopted by the Commission. Before this Court, the parties have confined their briefing on the first of these questions to the regulatory regimes of Wisconsin and Montana, and focused on the regulatory regimes of Connecticut and Arizona in briefing on the second question. We now reverse the Court of Appeals under the first question and remand for further proceedings under the second.

II

The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*. A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people. Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional [***422] regulations and controls. Against this background, in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, we upheld a state-supervised, market sharing scheme against a Sherman Act challenge. We announced the doctrine that federal antitrust laws are subject to supersession by state regulatory [*633] programs. Our decision was grounded in principles of federalism. *Id., at 350-352*.

[***LEdHR1C] [1C]The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our decisions in *Midcal, supra*, and *Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*.In *Midcal* we invalidated a California statute forbidding licensees in the wine trade to sell below prices set by the producer. There we announced the two-part test applicable to instances where private parties participate in a price-fixing regime. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *445 U.S. at 105* (internal quotation marks omitted). *Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of [**2177] respect for ongoing regulation by the State, not out of respect for the economics of price restraint. In *Midcal* we found that the intent to restrain prices was expressed with sufficient precision so that the first part of the test was met, but that the absence of state participation in the mechanics of the price posting was so apparent that the requirement of active supervision had not been met. *Ibid.*

The rationale was further elaborated in *Patrick* v. *Burget*. In *Patrick* it had been alleged that private physicians participated in the State's peer review system in order to injure or destroy competition by denying hospital privileges to a physician who had begun a competing clinic. We referred to the purpose of preserving the State's own administrative [*634] policies, as distinct from allowing private parties to foreclose competition, in the following passage:

> "The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. . . . The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . . The mere presence of some state involvement or monitoring does not suffice . . . . The active supervision prong of the *Midcal* test requires that state [***423] officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *486 U.S. at 100-101* (internal quotation marks and citations omitted).

Because the particular anticompetitive conduct at issue in *Patrick* had not been supervised by governmental actors, we decided that the actions of the peer review committee were not entitled to state-action immunity. *Id., at 106.*

[***LEdHR3] [3]Our decisions make clear that the purpose of the active supervision inquiry is not to deter-

mine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not [*635] simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

[***LEdHR4] [4]Although the point bears but brief mention, we observe that our prior cases considered state-action immunity against actions brought under the Sherman Act, and this case arises under the Federal Trade Commission Act. The Commission has argued at other times that state-action immunity does not apply to Commission action under § 5 of the Federal Trade Commission Act, *15 U. S. C. § 45*. See U.S. Bureau of Consumer Protection, Staff Report to the Federal Trade Commission on Prescription Drug Price Disclosures, Chs. VI(B) and (C) (1975); see also Note, The State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act, 89 Harv. L. Rev. 715 (1976).A leading treatise has expressed its skepticism of this view. See 1 P. Areeda & D. Turner, Antitrust Law P218 (1978). We need not determine whether the antitrust statutes can be distinguished on this basis, because the Commission does not assert any [**2178] superior pre-emption authority in the instant matter. We apply our prior cases to the one before us.

[***LEdHR1D] [1D]Respondents contend that principles of federalism justify a broad interpretation of state-action immunity, but there is a powerful refutation of their viewpoint in the briefs that were filed in this case. The State of Wisconsin, joined by Montana and 34 other States, has filed a brief as *amici curiae* on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the *amici* submission.

If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. The fact of the matter is that the States regulate [*636] [***424] their economies in many ways not inconsistent with the antitrust laws. For example, Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them. See *Patrick, 486 U.S. at 105*. Or Michigan may regulate its public utilities without authorizing monopolization in the market for electric light bulbs. See *Cantor v. Detroit Edison Co., 428 U.S. 579, 596, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*. So we have held that state-action immunity is disfavored, much as are repeals by implication. *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398-399, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*. By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.

States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Respondents contend that these concerns are better addressed by the requirement that the States articulate a clear policy to displace the antitrust laws with their own forms of economic regulation. This contention misapprehends the close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. See *Patrick, supra, at 100*. In the usual case, *Midcal*'s requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; [*637] it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State. It seems plain, moreover, in light of the *amici curiae* brief to which we have referred, that sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that these States deem necessary. For States whose object it is to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than an attractive nuisance in the economic sphere. To oppose these pressures, sole reliance on the requirement of clear articulation could become a rather meaningless formal constraint.

III

In the case before us, the Court of Appeals relied upon a formulation of the active supervision requirement articulated by the First Circuit:

> "'Where . . . [**2179] the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to de-

> clared standards of [***425] state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.'" *922 F.2d at 1136*, quoting *New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d at 1071.*

Based on this standard, the Third Circuit ruled that the active supervision requirement was met in all four States, and held that the respondents' conduct was entitled to state-action immunity from antitrust liability. *922 F.2d at 1140.*

[***LEdHR2B] [2B]While in theory the standard articulated by the First Circuit might be applied in a manner consistent with our precedents, it seems to us insufficient to establish the requisite level of active supervision. The criteria set forth by the First Circuit may have some relevance as the beginning [*638] point of the active state supervision inquiry, but the analysis cannot end there. Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision in either Wisconsin or Montana.

Respondents point out that in Wisconsin and Montana the rating bureaus filed rates with state agencies and that in both States the so-called negative option rule prevailed. The rates became effective unless they were rejected within a set time. It is said that as a matter of law in those States inaction signified substantive approval. This proposition cannot be reconciled, however, with the detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact. The ALJ found, and the Commission agreed, that at most the rate filings were checked for mathematical accuracy. Some were unchecked altogether. In Montana, a rate filing became effective despite the failure of the rating bureau to provide additional requested information. In Wisconsin, additional information was provided after a lapse of seven years, during which time the rate filing remained in effect. These findings are fatal to respondents' attempts to portray the state regulatory regimes as providing the necessary component of active supervision. The findings demonstrate that, whatever the potential for state regulatory review in Wisconsin and Montana, active state supervision did not occur. In the absence of active supervision in fact, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And as in *Patrick*, the availability of state judicial review could not fill the void. Because of the state agencies' limited role and [*639] participation, state judicial review was likewise limited. See *Patrick, 486 U.S. at 103-105.*

Our decision in *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*, though it too involved a negative option [***426] regime, is not to the contrary. The question there was whether the first part of the *Midcal* test was met, the Government's contention being that a pricing policy is not an articulated one unless the practice is compelled. We rejected that assertion and undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met. *Id., at 62, 66.* The concession was against the background of a District Court determination that, although submitted rates could go into effect without further state activity, [**2180] the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point. See *United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471, 476-477 (ND Ga. 1979).* In the case before us, of course, the Commission concedes the first part of the *Midcal* requirement and litigates the second; and there is no finding of substantial state participation in the ratesetting scheme.

This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing. *FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 434, n. 16, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990).* In this context, we decline to formulate a rule that would lead to a finding of active state supervision where in fact there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. Cf. *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)* (city billboard zoning ordinance entitled to state-action immunity). We do [*640] not have before us a case in which governmental actors made unilateral decisions without participation by private actors. Cf. *Fisher v. Berkeley, 475 U.S. 260, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)* (private actors not liable without private action). And we do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow

state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision. Cf. *324 Liquor Corp. v. Duffy, 479 U.S. 335, 344, n. 6, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987)* (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement). In the circumstances of this case, however, we conclude that the acts of respondents in the States of Montana and Wisconsin are not immune from antitrust liability.

IV

[***LEdHR5] [5]In granting certiorari we undertook to review the further contention by the Commission that the Court of Appeals was incorrect in disregarding the Commission's findings as to the extent of state supervision. The parties have focused their briefing on this question on the regulatory schemes of Connecticut and Arizona. We think the Court of Appeals should have the opportunity to reexamine its determinations with [***427] respect to these latter two States in light of the views we have expressed.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: SCALIA

CONCUR

JUSTICE SCALIA, concurring.

The Court's standard is in my view faithful to what our cases have said about "active supervision." On the other hand, I think THE CHIEF JUSTICE and JUSTICE O'CONNOR are correct that this standard will be a fertile source of uncertainty and (hence) litigation, and will produce total abandonment [*641] of some state programs because private individuals will not take the chance of participating in them. That is true, moreover, not just in the "negative option" context, but even in a context such as that involved in *Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*: Private physicians invited to participate in a state-supervised hospital peer review system may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be "active" enough.

I am willing to accept these consequences because I see no alternative within the constraints [**2181] of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, exemption for state-programmed private collusion in the first place.

DISSENT BY: REHNQUIST; O'CONNOR

DISSENT

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The Court holds today that to satisfy the "active supervision" requirement of state-action immunity from antitrust liability, private parties acting pursuant to a regulatory scheme enacted by a state legislature must prove that "the State has played a substantial role in determining the specifics of the economic policy." *Ante*, at 635. Because this standard is neither supported by our prior precedent nor sound as a matter of policy, I dissent.

Immunity from antitrust liability under the state-action doctrine was first established in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. As noted by the majority, in *Parker* we relied on principles of federalism in concluding that the Sherman Act did not apply to state officials administering a regulatory program enacted by the state legislature. We concluded that state action is exempt from antitrust liability, because in the Sherman Act Congress evidences no intent to "restrain state action or official action directed by a state." *Id.,* [*642] *at 351.* [1] "The *Parker* decision was premised on the assumption [***428] that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)* (footnote omitted).

> 1 The Court states that "continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," *ante*, at 632. However, in *Parker*, we held that the Sherman Act simply does not apply to conduct regulated by the State. The enforcement of the national antitrust policy, as embodied in the antitrust laws, may grant individuals more freedom to compete in our free market system, but it does not implicate the freedom of the States in deciding whether to regulate.

We developed our present analysis for state-action immunity for private actors in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. We held in *Midcal* that our prior precedent had granted state-action immun-

ity from antitrust liability to conduct by private actors where a program was "clearly articulated and affirmatively expressed as state policy [and] the policy [was] actively supervised by the State itself." *Id., at 105* (internal quotation marks and citation omitted). In *Midcal*, we found the active supervision requirement was not met because under the California statute at issue, which required liquor retailers to charge a certain percentage above a price "posted" by area wholesalers, "the State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id., at 100*. We noted that the state-action defense does not allow the States to authorize what is nothing more than private price fixing. *Id., at 105*.

In each instance since *Midcal* in which we have concluded that the active supervision requirement for state-action immunity was not met, the state regulators lacked authority, under state law, to review or reject the rates or action taken [*643] by the private actors facing antitrust liability. [2] Our most recent formulation of the "active supervision" requirement [**2182] was announced in *Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*, where we concluded that to satisfy the "active supervision" requirement, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id., at 101*. Until today, therefore, we have never had occasion to determine whether a state regulatory program which gave state officials authority -- "power" -- to review and regulate prices or conduct, might still fail to meet the requirement for active state supervision because the State's regulation was not sufficiently detailed or rigorous.

> 2 In *324 Liquor Corp. v. Duffy, 479 U.S. 335, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987)*, we held that a New York statute failed to shelter private actors from antitrust liability because the state legislation required retailers to charge 112% of the price "posted" by wholesalers. The New York statute, like the California statute at issue in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*, gave no power to the state agency to review or establish the reasonableness of the price schedules "posted" by the wholesalers. *324 Liquor, supra, at 345*.

Addressing this question, the Court of Appeals in this case used the following analysis:

> "'Where, as here, the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the [***429] private actors carry out the state's policy and not simply their own policy, more need not be established.'" *922 F.2d 1122, 1136 (CA3 1991)*, quoting *New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064, 1071 (CA1 1990)*.

The Court likens this test to doing away all together with the active supervision requirement for immunity based on state action. But the test used by the Court of Appeals is [*644] much more closely attuned to our "have and exercise power" formulation in *Patrick* v. *Burget* than is the rule adopted by the Court today. The Court simply does not say just how active a State's regulators must be before the "active supervision" requirement will be satisfied. The only guidance it gives is that the inquiry should be one akin to causation in a negligence case; does the State play "a substantial role in determining the specifics of the economic policy." *Ante*, at 635. Any other formulation, we are told, will remove the active supervision requirement altogether as a practical matter.

I do not believe this to be the case. [3] In the States at issue here, the particular conduct was approved by a state agency. The agency manifested this approval by raising no objection to a required rate filing by the entity subject to regulation. This is quite consistent with our statement that the active supervision requirement serves mainly an "evidentiary function" as "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie v. Eau Claire, 471 U.S. 34, 46, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*.

> 3 The state regulatory programs in *Midcal, supra, Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)*, and *324 Liquor, supra*, would all fail to provide immunity for lack of active supervision under the test adopted by the Court of Appeals.

The Court insists that its newly required "active supervision" will "increase the States' regulatory flexibility." *Ante*, at 636. But if private actors who participate, through a joint rate filing, in a State's "negative option" regulatory scheme may be liable for treble damages if they cannot prove that the State approved the specifics of a filing, the Court makes it highly unlikely that private actors will choose to participate in such a joint filing. This in turn *lessens* the States' regulatory flexibility, because as we have noted before, joint rate filings can im-

prove the regulatory process by ensuring that the state agency has fewer filings to consider, allowing more resources to be expended on each filing. [*645] *Southern Motor Carriers Rate Conference, Inc. v. United States, supra, at 51.* The view advanced by the Court of Appeals does not sanction price fixing in areas regulated by a State "not inconsistent with the antitrust laws." *Ante*, at 636. A State must establish, staff, and fund a program to approve [**2183] jointly set rates or prices in order for any activity undertaken by private individuals under that program to be immune under the antitrust laws. [4]

4 In neither of the examples cited by the majority as instances of state regulation not intended to authorize anticompetitive conduct would application of a less detailed active supervision test change the result. In *Patrick v. Burget, supra*, we concluded there was no immunity because the State did not have the authority to review the anticompetitive action undertaken by the peer review committee; in *Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*, it is unlikely that the clear articulation requirement under our current jurisprudence would be met with respect to the market for light bulbs.

[***430] The Court rejects the test adopted by the Court of Appeals, stating that it cannot be the end of the inquiry. Instead, the party seeking immunity must "show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." *Ante*, at 638. [5] Such an inquiry necessarily puts the federal court in the position of determining the efficacy of a particular State's regulatory scheme, in order to determine whether the State has met the "requisite level of active supervision." *Ante*, at 637. The Court maintains that the proper state-action inquiry does not determine whether a State has met some "normative standard" in its regulatory practices. *Ante*, at 634. But the Court's focus on the actions taken by state regulators, *i. e.*, the way the State regulates, necessarily requires a judgment as to whether the State is sufficiently active -- surely a normative judgment.

5 It is not clear, from the Court's formulation, whether this is a separate test applicable only to negative option regulatory schemes, or whether it applies more generally to issues of immunity under the state-action doctrine.

[*646] The Court of Appeals found -- properly, in my view -- that while the States at issue here did not regulate respondents' rates with the vigor petitioner would have liked, the States' supervision of respondents' conduct was active enough so as to provide for immunity from antitrust liability. The Court of Appeals, having concluded that the Federal Trade Commission applied an incorrect legal standard, reviewed the facts found by the Commission in light of the correct standard and reached a different conclusion. This does not constitute a rejection of the Commission's factual findings.

I would therefore affirm the judgment below.

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins, dissenting.

Notwithstanding its assertions to the contrary, the Court has diminished the States' regulatory flexibility by creating an impossible situation for those subject to state regulation. Even when a State has a "clearly articulated policy" authorizing anticompetitive behavior -- which the Federal Trade Commission concedes was the case here -- and even when the State establishes a system to supervise the implementation of that policy, the majority holds that a federal court may later find that the State's supervision was not sufficiently "substantial" in its "specifics" to insulate the anticompetitive behavior from antitrust liability. *Ante*, at 635. Given the threat of treble damages, regulated entities that have the option of heeding the State's anticompetitive policy would be foolhardy to do so; those that are compelled to comply are less fortunate. The practical effect of today's decision will likely be to eliminate so-called "negative option" regulation from the universe of schemes available to a [***431] State that seeks to regulate without exposing certain conduct to federal antitrust liability.

The Court does not dispute that each of the States at issue in this case *could have* supervised respondents' joint ratemaking; rather, it argues that "the potential for state supervision [*647] was not realized in fact." *Ante*, at 638. Such an after-the-fact evaluation of a State's exercise of its supervisory [**2184] powers is extremely unfair to regulated parties. Liability under the antitrust laws should not turn on how enthusi-astically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State were immune from antitrust prosecution, but that its actions in the other resulted in treble-damages liability.

Moreover, even if a regulated entity could assure itself that the State will undertake to actively supervise its rate filings, the majority does not offer any guidance as to what level of supervision will suffice. It declares only that the State must "play a substantial role in determining the specifics of the economic policy." *Ante*, at 635. That

standard is not only ambiguous, but also runs the risk of being counterproductive. The more reasonable a filed rate, the less likely that a State will have to play any role other than simply reviewing the rate for compliance with statutory criteria. Such a vague and retrospective standard, combined with the threat of treble damages if that standard is not satisfied, makes "negative option" regulation an unattractive option for both States and the parties they regulate.

Finally, it is important to remember that antitrust actions can be brought by private parties as well as by government prosecutors. The resources of state regulators are strained enough without adding the extra burden of asking them to serve as witnesses in civil litigation and respond to allegations that they did not do their job.

For these reasons, as well as those given by THE CHIEF JUSTICE, I dissent.

REFERENCES

Applicability of "state action" doctrine granting immunity from federal antitrust laws for activities of, or directed by, state governments--Supreme Court cases

43 Am Jur 2d, Insurance 18, 525-527; 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 15, 18, 45; 55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 778

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 45(a)(1)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 37

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices; State Action; Title Insurance

Index to Annotations, Restraints of Trade and Monopolies: State Action; Title Examination; Title Insurance

Annotation References :

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. *42 L Ed 2d 946.*

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws. *12 ALR Fed 329.*

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2009-41-T

IN RE:

Application of South Carolina Tariff Bureau, Incorporated for a Rate Increase	))))	**CERTIFICATE OF SERVICE**

This is to certify that I, Chrystal L. Morgan, have this date served one (1) copy of the **BRIEF OF THE SOUTH CAROLINA OFFICE OF REGULATORY STAFF** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

T. David Rheney, Esq.
Gallivan, White & Boyd, P.A.
Post Office Box 10589
Greenville, SC 29603

Chrystal L. Morgan

Chrystal L. Morgan

June 26, 2009
Columbia, South Carolina